IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.67 OF 2007

WITH

NOTICE OF MOTION NO.68 OF 2007

WITH

NOTICE OF MOTION NO.69 OF 2007

IN

WRIT PETITION NO.158 OF 2006

1. Guru Swarup Srivastava, Indian)
Inhabitant having his address at)
Swarup Group of Industries, B-510,)
Crystal Plaza, New Link Road,)
Andheri (W), Mumbai - 400 053.)
)
2. Deepsikha Guru Srivastava, Indian)
Inhabitant, having her address at)
Building No.A-1/61, Windermers,)
Oshiwara Link Road, (extention)
Andheri (W), Mumbai - 400 053.)
)
3. Mehar Swarup Srivastava, Indian)
Inhabitant having his address at)
Swarup Group of Industries, B-510,)
Crystal Plaza, New Link Road,)
Andheri (W), Mumbai - 400 053.)..Petitioners.

V/s.

1. The Directorate of Enforcement)
Mittal Chambers, 2nd floor,)
Nariman Point, Mumbai - 400 021.)
)
2. The Assistant Director of)
Enforcement, Mittal Chambers,)
2nd Floor, Nariman Point,)
Mumbai - 400 021.)
)
3. Union of India, Aayakar Bhavan,)
M.K.Road, Mumbai - 400 021.)..Respondents.

Mr.J.P.Cama, senior counsel with P.S.Gidwani, Dev Galani and Ms.Nadia Bhatia for petitioners.

Mr.Y.R.Mishra with A.S.Rao for respondents.

Mr.D.N.Salvi for C.B.I.

Mr.Shashipal Shankar for Intervenor.

CORAM : F.I.REBELLO AND J.P.DEVADHAR, JJ.

JUDGMENT RESERVED ON : 11TH SEPTEMBER, 2007.

JUDGMENT PRONOUNCED ON : 2ND OCTOBER, 2007.

JUDGMENT (PER F.I.REBELLO, J.)

The Petitioner No.1 is a citizen of India and is doing business of exports and imports in the name of Swarup Group of Industries (SGI). SGI had a contract with China Railways Logistics (CRUL), an undertaking of the Ministry of Railways of Government of China for long term supply of iron /manganese ore to China.

The petitioner No.3 is the son of the petitioner No.1 and also additional Director of SGI. The petitioner No.3 in addition had opened foreign Bank accounts in Hongkong, admittedly, without the permission of the Reserve Bank of India.

The petitioner No.2 is the wife of

petitioner No.1. The record indicates that she has no concern with the SGI. In the petition, she is described as principal of a school.

2. It seems from the records, including the information produced in the Court in sealed cover, that the entire proceeds of exports worth Rs.110 crores approximately were not received in the account of the SGI in India. The contention is that there is evidence on record that substantial funds were diverted to foreign bank account of the petitioner No.3 in Account No.636-49610-833, HSBC, Foong House Branch, Kawloon, Hongkong. It is also an apprehension that the export proceeds may have been diverted to other foreign accounts.

A search was carried out on the business premises of SGI and the residential premises of the petitioners. A summons was also served to the petitioner No.1 on 17/6/2005. The petitioner was called upon to produce various documents like passport and other documents and file of exports and imports of 2002-2003 till date of the summons and also various other documents. According to the petitioner No.1, the summons were issued and search and seizure were conducted at the residence and office without any investigation or any basis whatsoever and without

application of mind. Various documents and also the passports of the petitioners were seized. The petitioners made a demand for release of the passports. The passports were not released. Consequently, the petitioner has filed the petition for a declaration that the seizure carried out on 7th July, 2005 was malafide, illegal, ultra vires and void. and also for declaration that the materials seized therein and statements recorded and all acts done therein are illegal, ultra vires and void. Various other reliefs have been sought including release of records which have ben seized. By way of interim relief, prayer was sought for release of passport of the petitioner as also release of all documents that were seized. The petition has been admitted and is pending.

3. On 6th February, 2006 an order came to be passed by this Court noting that the investigation was in progress and the respondents have sought two months. The Court, however, considering the documents have been seized in July, 2005 thought it fit to grant 6 weeks time to complete the investigation and to issue appropriate show cause notice to the petitioners. This Court also in the meantime permitted the petitioner No.3 to move the concerned authority for release of his passport for a limited period as the petitioner No.3 was going to get married shortly.

4. A notice of Motion No.109 of 2006 was thereafter taken out wherein the counsel prayed for the return of the passport of the petitioner No.3 in the same condition as it was seized on such terms and conditions. This Court noted as to what had transpired after the search was conducted on 7th July, 2005. The documents demanded by the respondent No.2 Assistant Director, Directorate of Enforcement, FEMA were also furnished on 25th January, 2005. Various statements were recorded. The Court by its order issued certain directions and permitted the petitioner No.3 to go abroad on 8th March, 2006 to 26th March, 2006.

5. The petition came up on board on 27th March, 2007 at the instance of the revenue seeking extention of time to complete the investigation till 30th June, 2006. That prayer was opposed by the petitioners. The Court noted that when the order for temporary release of the passport to the petitioner No.3 was passed, the advocate for the revenue had reiterated that by 27th March, 2006 the investigation shall be completed. The Court noticed that by the affidavit filed it was pointed out that the investigation could not be completed as the matter has been taken up with the overseas authorities to provide the complete transcript of foreign account of

M/s.Wealthy Fortune International Ltd., Hongkong of the petitioner No.3 and complete transcript of account of M/s.RUL China. The Court extended the time to complete the investigation, if necessary, upto 25th May, 2006. The Court clarified as under:-

> "We clarify that if the investigation is not completed and show cause notice is not issued to the petitioners by 25th May, 2006, an inference may be drawn that searches and seizure that took place on 7th July, 2006 were not legal and justified and the writ petition may be disposed of accordingly. "

Revenue preferred a Special Leave Petition against that order. The Supreme Court in Civil Appeal No.2749 of 2006 noted that the show cause notice has been issued on 24/5/2006. But issuance of show cause notice does not necessarily mean that further investigation cannot be done. At the same time, the Supreme Court noted that the investigation should be completed within a reasonable time. Accordingly, the observations in paragraph 6 of this Court was clarified to the aforesaid extent. The appeal was disposed off in June, 2006 with the said directions.

This petition was admitted on 11/7/2006.

6. The proceedings initiated are under the provisions of Foreign Exchange Management Act, 1999. There is no proviso under the Act for a penalty in the nature of imprisonment. The penalty is by way of imposition of fine and on failure to pay the same, there is a proviso for detaining a person who failed to pay the amount, in Civil prison.

7. At this stage, it may be noted and to which reference we have made that pursuant to the compliant, show cause notice has been issued only in so far as petitioner Nos.1 & 3 are concerned. No show cause notice has been issued against the petitioner No.2 i.e. the wife of petitioner No.1.

8. Each of the three petitioners have taken out motions for release of their passport during the pendency of the petition as also for other documents. We make it clear that at this stage by the present motions what we are considering are the release of the passports and not other documents. The case of the petitioner Nos.1 & 3 are that they are businessmen. Petitioner No.1 further contended that he is required to be present abroad in respect of arbitration proceedings pending in London and to visit foreign

countries, including China in order to get back the business of exports and imports. On 10th April, 2007 the petitioner No.1 filed affidavit disclosing the particulars of his assets pursuant to the directions issued by the Court as set out in para 2 of his affidavit dated 4th April, 2007. An additional affidavit dated 3rd May, 2007 is furnished of list of assets (free from encumbrances) owned by the petitioners.

9. On behalf of the respondent Directorate replies have been filed opposing the release of the passports. In the affidavit dated 1st August, 2007 of one Arvind Kumar Singh, it was set out that the statement of accounts furnished by the petitioner was not complete and it does not contain the entire transcript of the foreign bank accounts. A clarification was sought from the petitioner No.3 by letter dated 25/7/2007 on the missing portion of the statement of accounts, current account details and details of the transaction reflected in the said statement. According to the respondents, the petitioner No.3 has submitted and / or given evasive and vague reply to the letter. Further clarifications were sought to which the petitioner No.3 has refused to give any reply.

An additional affidavit was filed on 5th September, 2007 contending that the petitioner had failed to comply with the order of this Court dated 19/7/2007. We had directed the petitioner No.3 to furnish whatever information was required. The petitioner in his affidavit on 17th July, 2007 has referred to the account in the name of M/s.Wealthy Fortune International Ltd. bearing No.541-209458-838 with HSBC Bank Hongkong branch. A reference was also made to the details of the Account No.636-496101-833 with HSBC Bank, Hongkong Branch. It was pointed out that the account was operated one line since February, 2006 and the last transaction took place on 27/2/2006 when the account balance came down to zero. In respect of M/s.Wealthy Fortune International Ltd., it was pointed out that it was opened on 30/6/2006 by depositing 2000 Hongkong dollars (HKD) and the said account was never operated till 27/2/2006 when the balance came down to zero and that there have been no transactions in the account from 30/6/2004.

10. According to the counsel for the respondent No.1 to 3 the passport is a document which the respondent were open to take in possession and retain the same in the course of the search. The respondents have also filed submissions. In the submissions of 3rd May, 2007, it is contended that the petitioners after

exporting iron-ore to RUL, China instead of bringing into India, the foreign exchange accrued abroad, opened an account in the name of petitioner No.3 and floated a company known as Wealthy Fortune International with Jiao Cheng Chen, an employee of RUL, China. It is pointed out that the foreign exchange business was done to the extent of Rs.100 crores in the name Swarup Group of Industries. It would be clear, therefore, that in so far as the petitioner No.1 is concerned, the contention is that though his company had exported iron-ore, the entire foreign exchange had not been brought into India. In so far as the petitioner No.3 is concerned, there is a contention that the petitioner No.3 has opened accounts without the permission of the Reserve Bank of India into which the proceeds of the exports have been diverted. Further submissions were filed on 10th September, 2007.

11. The question is, whether considering the long passage of time and various directions issued by this Court as also the Supreme Court for completion of the investigation, the respondents are within their jurisdiction to retain the petitioners passports and / or the petitioners are entitled for release of the passports.

12. In so far as Notice of Motion No.68 of 2003

is concerned, i.e. of petitioner No.2, no show cause notice has been issued to the said petitioner No.2. In the written submissions, the only contention is that the property standing in her name in Lokhandwala complex is obtained from NAFED money routed through various accounts. It may be mentioned that for the purpose of exports, NAFED have advanced to the petitioners Rs.235 crores under certain terms and conditions. The petitioner No.1 has repaid some amount and there are still balance amount in respect of which NAFED has initiated arbitrary proceedings. It appears that there are also some criminal proceedings which we shall advert to lateron. Then there are some allegations which in our opinion are irrelevant that the petitioner No.2 is involved in the collaboration for defrauding NAFED. In respect of the search which took place on 7/7/2005 and the absence of a complaint or a show cause notice against the petitioner No.2, prima facie, the action of the respondents in continuing to hold on to the passport of petitioner No.2 and not releasing is unreasonable. The petitioner No.2, would therefore, be entitled to the interim measure of release of her passport.

13. We then come to the case of the petitioner No.1. The respondents are aware as to the amount of exports which have taken place. The major contention

is that all those proceeds have not been received. There is a dispute raised by the petitioner as to the actual realisation of the contractual amount from RUL. Suffice it to say that it is not necessary for us to go into those aspects. Once complaint is filed and a show cause, notice is issued and considering the order of the Supreme Court passed in June, 2006, the respondents had sufficient time to carry out further investigation. Material supplied to us in sealed envelope are part of the proceedings. Last of the communication enclosed is of 28th December, 2005. Even assuming that we are not deciding whether the passport is a document, the question is, whether the action of the respondents in holding on to the passport of the petitioner No.1 is reasonable. The only general argument canvassed before us is that there is an apprehension that if the petitioner No.1 is allowed to go abroad, he may tamper with the evidence and / or not return to India. As pointed out earlier, the valuation of the exports are already known. In these circumstances, in our opinion, withholding of the passport of the petitioner No.1 would be arbitrary considering that by passing of time, the petitioner No.1 cannot be precluded from carrying on his business activity by denying him the passport. As an interim measure, the petitioner No.1 would be entitled to the use of the passport subject to certain terms and conditions.

14. The next is the case of the petitioner No.3, in respect of whom the allegations are that he has opened a foreign bank accounts in Hongkong and not disclosed the true details. According to the petitioner No.3, he has given the transcript of all the bank transaction which are available. According to the respondents, the petitioner No.3 is suppressing some facts. Be that as it may, the petitioner No.3 was allowed to go abroad on an interim directions at the time of his marriage. He has come back. We see, therefore, no reason as to why he should not be entitled to use the passport subject to certain terms and conditions.

In the light of the above, all the three motions can be disposed of as under:-

1. In so far as Notice of Motion No.68 of 2007 is concerned, by way of interim measure we direct the release of the passport of the petitioner No.2 on petitioner No.2 filing an undertaking before this Court that she will not leave the country either with the petitioner No.1 or the petitioner No.3 or jointly with them. In other words, if she has to travel the petitioner No.1

or 3, or both would not accompany her. The travel abroad would not be for a duration of more than 30 days at a time. Liberty to apply in an unforseen event she wants to travel with the respondent No.1.

2. In so far as the petitioner No.1 is concerned, the passport be released subject to the following conditions:-

a) the petitioner to furnish bank guarantee in the sum of Rs.1 crore to the satisfaction of the Prothonotary and Senior Master.

b) the petitioner No.1 to file an undertaking in the Court that if he seeks to travel abroad he would not travel in the company of the petitioner No.2 or the petitioner No.3 or jointly. When the petitioner No.1 leaves India, the petitioner Nos.2 & 3 shall be available in the country.

c) the duration of the visit would not be not more than 45 days at a time. On

return, the petitioner will intimate to the respondent No.2 of his return and make available the passport for examination to respondent No.2, who will examine the passport and return the same to the petitioner No.1.

3. In so far as the petitioner No.3 is concerned, his passport be released subject to the following conditions:-

a) the petitioner No.3 to furnish bank guarantee of Rs.1 crore to the satisfaction of Prothonotary & Senior Master pending the hearing and final disposal of the petition.

b) The petitioner No.3 to file an undertaking in the Court that if he has to go abroad, he will not go in the company of the petitioner No.1 or the petitioner No.2 and / or jointly and at any rate, whenever petitioner No.1 or 3 may be abroad.

c) the duration of the visit would not be for more than 30 days at a time.

15) We propose to make a further direction in respect of the petitioner No.1. Our attention is invited to certain criminal proceedings which have been initiated against the petitioner No.1. In an application for anticipatory bail filed by the petitioner No.1, by order dated 4/10/2006 there was a direction that the applicant shall surrender his passport to the CBI in case he receives it back from the Enforcement Directorate and shall not leave India without the Court's permission. The petitioner No.1 has moved the Hon'ble Supreme Court by way of Special Leave to Appeal (Cri) No.1822 of 2007 and an order came to be passed on 20th April, 2007 staying all further proceedings. The release of the passport of the petitioner No.1 will be subject to directions that may be issued by the Supreme Court for release of his passport.

17) All the three Notice of Motions are disposed of accordingly.

(F.I.REBELL0, J.)

(J.P.DEVADHAR, J.)